No. 05-1508

In the Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89
AND GALLUP-McKINLEY COUNTY PUBLIC
SCHOOL DISTRICT NO.1

Petitioners,

v.

UNITED STATES DEPARTMENT OF EDUCATION, et al.,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The question presented is:

1. Whether the Secretary has the authority to create and impose his formula over the one prescribed by Congress and through this process certify New Mexico's operational funding for fiscal year 1999-2000 as "equalized," thereby diverting the Impact Aid subsidies to the State and whether this is one of the rare cases where this Court should exercise its supervisory jurisdiction to correct a plain error that affects all State school districts that educate federally connected children.

LIST OF PARTIES

Petitioners are New Mexico public school districts: the Zuni Public School District No. 89 and the Gallup-McKinley County Public School District No. 1. Respondents are the United States Department of Education and the New Mexico Public Education Department.

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OPINIONS BELOW

The *en banc Per Curiam* ruling of the United States Court of Appeals for the Tenth Circuit dated February 23, 2006 is officially reported at 437 F.3d 1289 and is reproduced in Pet. App. at 1a.

The original Opinion of the United States Court of Appeals for the Tenth Circuit dated December 30, 2004 is officially reported at 393 F.3d 1158. It was vacated by the *en banc* ruling. It is reproduced in Pet. App. at 3a.

The decision of the Secretary of the United States Department of Education dated October 11, 2001 is reproduced in Pet. App. at 34a.

JURISDICTION

This Court has jurisdiction to review the *en banc* of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. §1254. Federal jurisdiction in the Circuit Court was present under 20 U.S. C. § 7711(b)(1) which allows appeals of decisions of the Secretary to the United States Court of Appeals.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions relate to the federal Impact Aid Program and are:

1. 20 U.S.C. §240(d) repealed (Pet. App. at 69a)
2. 20 U.S.C. § 7709 (2000) (Pet. App. at 59a)
3. 34 C.F.R. Part 222, Subpart K (2000) (including Appendix. to Subpart K) (Pet. App. at 76a)
4. Former 34 C.F.R. §222.63 (1993) (Pet. App. at 97a)

5. Former 34 C.F.R. Appendix §222 (1993) (Pet. App. at 99a)

6. 5 U.S.C. §553 (JA 93-94)

STATEMENT

This case concerns the Secretary of Education's failure to obey the statutory command of 20 U.S.C. § 7709(b)(2)(B) to use a certain formula in making state school funding "equalization" calculations in connection with the Federal Impact Aid Program established by 20 U.S.C. § 7709, *et. seq.* Instead, the Secretary has chosen to use a different formula to make those calculations - a formula which substitutes the Secretary's policy choices for the policy choices made by the Congress when the statutory formula was enacted in 1994.

The Zuni Public School District is a New Mexico public school district located entirely within the Pueblo of Zuni Reservation. It has virtually no tax base. Over 65% of the Gallup-McKinley County Public School District No. 1 consists of Navajo Reservation lands which are also not taxable by State school districts. Under the Impact Aid Program (20 U.S.C. § 7709 *et seq.*) public school districts such as Zuni and Gallup impacted by a federal presence which reduces ordinary bonding and taxing capacity are entitled to receive Federal Impact Aid funding to offset this impact. *Indian Oasis-Baboquivari Unified School District No. 40 of Pima County v. Kirk*, 91 F.3d 1240 (9th Cir. 1996). The Impact Aid Program, however, provides an exception. It allows States to take credit for the Impact Aid payments by correspondingly reducing the amount of operational funding the State would otherwise provide to Impact Aid districts if the State can establish that state provided operational funding

for its school districts (statutorily referred to as Local Educational Agencies or LEAs) is otherwise "equalized."

As authorized by statute in 1974 (20 U.S.C. § 240(d), Pet. App. at 69a), the Secretary of Education originally established the equalization formula by regulation in 1976 (Pet. App. at 159a).

In 1994, however, Congress legislatively removed from the Secretary the authority to create the equalization formula and legislatively established a new formula (Pet. App. at 59a). Under Congress' 1994 formula (the current statutory formula) a State's operational funding is considered equalized if there is no more than a 25% disparity in per-pupil revenues between the highest and lowest per-pupil revenues of LEAs which are ranked in order of per-pupil revenues. The statute then requires that the Secretary reduce the field of LEAs which will be examined to determine if the 25% disparity is exceeded by disregarding "local educational agencies (LEAs) with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State. . . ." (20 U.S.C. §7709(b)(2)(B)) (Pet. App. at 61a). As explained in detail further in this brief, the statutory formula for developing the final field of LEAs differed from the Secretary's 1976 regulatory formula because the Secretary's formula involved a process of eliminating "percentiles of pupils" in attendance at all LEAs as the means for reducing the final field of LEAs as to which the disparity test would be applied. This step in the old formula was eliminated by the 1994 statute.

Following enactment of the 1994 statute the Secretary, by 1995 regulation, recited the statutory formula in the body of the regulation, but in an Appendix to the regulation resurrected the Secretary's 1976 formula. The Secretary has

continued to follow the 1976 formula ever since (Pet. App. at 200a and 217a).

The Secretary's formula as applied to New Mexico for fiscal year 2000 (July 1, 1999-June 30, 2000) eliminated 23 of the State's 89 LEAs (26%) before applying the 25% disparity standard. The statutory formula eliminates 10 of the LEAs (11%). Under the Secretary's formula, New Mexico is "equalized" and is permitted to reduce operational funding to the federally impacted districts by the amount of their Impact Aid receipts.[1] Under Congress' formula, New Mexico is not equalized and New Mexico's federally impacted districts are entitled to retain their additional share of approximately $50,000,000 per annum of Impact Aid funds without suffering offsetting reductions in their state provided operational funding. This $50,000,000 is approximately 2.7% of the State's annual operational expenditures for public education. (Pet. App. at 201a, 234a-236a).

An annual certification hearing before the United States Department of Education is conducted to determine whether a State's operational funding is equalized. (Pet. App. at 205). This hearing was conducted for fiscal year 2000 and objection was made to the Secretary's use of the old formula reproduced in the Appendix as opposed to the new statutory formula. (Pet. App. at 222a) The Secretary insisted on using the Appendix formula and New Mexico's funding was determined to be "equalized" under that formula. (Pet. App. at 41a) Petitioners protested and sought a hearing before a United States Department of Education administrative law judge pursuant to 20 U.S.C. § 7711(a).

The administrative law judge questioned how the Secretary's formula could be reconciled with the statute, but

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[1] New Mexico by statute takes credit for 75% of the Impact Aid payments. NMSA 1978 § 22-8-25. (Pet. App. at 72a)

ruled that as an employee of the Federal Department of Education he did not have the jurisdiction to rule on the validity of the Secretary's formula and confirmed that New Mexico was "equalized" under the Secretary's formula. (Pet. App. at 43a) That decision was appealed to the Secretary. The appeal was denied. (Pet. App. at 34a)

Petitioners appealed to the Tenth United States Circuit Court of Appeals pursuant to 20 U.S.C. § 7711(b)(1). A three judge panel of the Tenth Circuit issued its opinion on December 30, 2004. Two of the judges affirmed the decision of the Secretary and one judge dissented. (Pet. App. at 3a) Petitioners successfully petitioned for rehearing *en banc*. Months after a second oral argument, the Tenth Circuit announced that the 12 members of the *en banc* panel were evenly divided and no decision would be issued, and that the panel decision was vacated. (Pet. App. at 1a) The decision of the Secretary stood by default.

SUMMARY OF ARGUMENT

Petitioners contend that they, and other similarly impacted LEAs, are entitled to receive federal Impact Aid payments without offset against their State operational funding, because the State of New Mexico does not qualify for the Impact Aid equalization exception. That exception permits such offset when a State demonstrates that the operational funding it provides to its LEAs is "equalized" under a formula statutorily created within the Impact Aid Act. Petitioners' specific objection is that the Secretary is not following the statutory formula. In particular, the Secretary's formula does not contain the percentile calculations required by the statute for determining the final list of LEAs (ranked by per-pupil revenues) against which the statute's 25% disparity test is applied. Instead, the Secretary's formula injects a wholly extraneous step involving elimination of LEAs based on their

pupil attendance numbers, a criterion not included in the statutory formula. The Secretary continues to use a formula created by regulation in 1976 which was supplanted by the statute in 1994. New Mexico has "equalized" its operational funding under the Secretary's formula. It has not done so under the statutory formula.

ARGUMENT

A. THE LEGISLATIVE AND REGULATORY HISTORY SHOWS HOW TWO IMPACT AID FORMULAS EMERGED - ONE AUTHORIZED BY THE SECRETARY; ONE AUTHORIZED BY CONGRESS

The evolution of the current statutory formula and the Secretary's conflicting formula can best be understood by review of the legislative and regulatory history. The legislative and regulatory sequence is as follows.

1. Prior to 1974, all Impact Aid went to the impacted school districts. Chapter 1124 - Pub. L. 874.

2. In 1974, Congress enacted 20 U.S.C. § 240(d) (Pet. App. at 69a), which was later repealed in 1994 by Pub. L. 103-382. The 1974 statute allowed States to take "into consideration, Impact Aid payments, provided there were equalized operational expenditures made to school districts." The term "equalized expenditures" was to be "defined by the Secretary by regulation." (Pet. App. at 70a)

3. The Secretary followed a public notice-and-comment procedure in developing these regulations in 1976. The Secretary proposed in draft regulations that the LEAs would be ranked in order of LEAs' per-pupil revenues. A comparison would then be made between the per-pupil revenue of the highest and lowest ranked LEAs. (Pet. App. at 159a) However, the Secretary was concerned that if all LEAs

were included in the rankings, anomalies associated with top ranked and bottom ranked LEAs might distort the true nature of a State's operational funding. (41 F.R. 26320, 26323-26324, "Response" at Pet. App. at 130a-131a) During the public notice-and-comment proceedings, comments focused on the best method for reducing the field of LEAs. Part of the discussion focused on whether it was preferable to eliminate percentiles of LEAs or to eliminate percentiles of pupils as a device for then eliminating LEAs in developing the final field of LEAs as to which the equalization or "disparity" determination would be made. Some commentators recommended the percentile elimination of LEAs. Others recommended the percentile elimination of pupils:

> **Comment**. Regarding the procedure for calculating the "disparity" standard in §115.62(b), one commentator was not sure whether pupils or school districts are to be considered when determining the 95th and 5th percentiles, while two commentators advocated that the 95th and 5th percentile exclusions be based on number of school districts and not on number of pupils in excluding the school districts. A fourth commentator argued that calculating a disparity between school districts would have the effect of minimizing the real school-by-school disparities in States with small numbers of school districts while exposing those disparities in States with large numbers of districts. The commentator offered an alternative scheme of his own design for calculating a measure of fiscal neutrality. The scheme would incorporate into a single index measures of wealth disparity and percentage of local revenues equalized to allow for considerations of fiscal neutrality based programs. [Pet. App. at 130-130a]

The Secretary then responded at 130a -131a:

> **Response**. The interim regulation has been rewritten to make it clear that the referenced percentiles are based on numbers of pupils. Section 115.62(b)(1) provides that in calculating the disparity standard according to procedures set forth in Appendix A, the districts in the State will be ranked on the basis of current expenditures or revenue per pupil, and that those districts which fall above the 95th or below the 5th percentile of those agencies in terms of the number of pupils in attendance in the schools of those agencies will be excluded for the purposes of the calculation. The percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of districts. However, it appears that the proposed regulation may not have been as clearly expressed as desired. In regard to the question of pupils versus districts for the percentiles used in calculating the disparity standard, it is the commissioner's view that basing an exclusion on the number of districts would act to apply the disparity standard in an unfair and inconsistent manner among states. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In states with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those states. Conversely, in states with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics. [Emphasis added]

4. The Secretary then promulgated the new regulations in 1976, incorporating the percentile elimination of pupils into his new "equalization" formula. (Pet. App. at 141-142) The actual formula was produced as Appendix A to a new Subpart G to Part 115 of Title 45 of the Code of Federal Regulations. (Pet. App. at 142a and 159a) The regulations were codified as 34 C.F.R. 222.63 (1993). (Pet. App. at 97a)

The Secretary, in the body of the regulation (§ 115.62(b)), established the permitted disparity limit between the top ranked and bottom ranked LEA for per-pupil revenue and expenditures at 25%, but did not further define the process to be used for making the equalization determination except through the Appendix to the regulation. (Pet. App. at 99a, 159a)

The Appendix to the 1976 regulation provided:

Appendix

The determination of disparity in current expenditures or revenues per pupil is made by:

(a) Ranking all local educational agencies having similar grade levels within the State on the basis of current expenditures or revenues per pupil with respect to the fiscal year for which data has been submitted in accordance with these regulations;

(b) Identifying those local agencies in each ranking which fall at the 95th and 5th percentiles of the **total number of pupils in attendance** in the schools of these agencies; and

(c) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (b) and dividing the difference by the lower figure.

Example: In State X, after ranking all local education agencies organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in these agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1000. The percentage disparity between the 95th and 5th local educational agencies is 22 percent ($1000-$820=$180/$820). The program would be deemed to qualify. (Pet. App. at 159a - 160a) [Emphasis added].

5. Congress changed the system with enactment of 20 U.S.C. § 7709 in 1994.

Section 20 U.S.C. § 7709(b) provides:

(1) In general

A State may reduce State aid to a local educational agency that receives a payment under section 7702 or 7703(b) of this title (except the amount calculated in excess of 1.0 under subparagraph (B) of section 7703(a)(2) of this title) or under the Act of September 30, 1950 (Public Law 874, 81st Congress) [20 U.S.C.A. §§ 236 to 244] as such Act was in effect on the day preceding October 20, 1994 (other than an increase in payments described in paragraphs (2)(B), (2)(C), (2)(D), or (3)(B)(ii) of section 3(d) of such Act of September 30, 1950 [20 U.S.C.A. § 238(d)]) for any fiscal year if the Secretary determines, and certifies under subsection (c)(3)(A) of this section, that such State has in effect a program of State aid that

equalizes expenditures for free public education among local educational agencies in such State.

(2) Computation

(A) In general

For purposes of paragraph (1), a program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.

(B) Other factors

In making a determination under this subsection, the Secretary shall–

(i) disregard local educational agencies with **per-pupil expenditures or revenues** above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State; and

(ii) take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities. [Emphasis added]

This statute eliminated the Secretary's authority to establish the equalization formula by creating a new and different

equalization formula. Now, instead of eliminating LEAs based on their numbers of pupils above the 95th percentile and below the 5th percentile, the statute required the Secretary to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." (emphasis added) (§ 7709(b)(2)(B)(i)). This reversed the Secretary's 1976 decision to eliminate LEAs based on the percentile elimination of "the total number of pupils" by now requiring the elimination of LEAs based solely on their per-pupil revenues in selecting the final field as to which the disparity standard would be applied. (Pet. App. at 61a)

6. On September 29, 1995, in Vol. 60 Federal Register 50778, *et. seq.*, the Secretary promulgated Regulation Subpart K to 34 C.F.R. Part 222. (Pet. App. at 163a and 173a) This was subsequently codified at 34 C.F.R. Section 222.160 (Subpart K). (Pet. App. at 76a and 81a) The purpose of the regulation was to "implement the provisions of Section 8009 and [did] not establish definitions and standards for any other purpose."[2] (§222.160(b) (Pet. App. at 76a) New regulation Section 222.162 included the new statutory formula:

> §222.162. What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?
>
> (a) *Percentage disparity limitation.* The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25%. In determining the disparity percentage, the

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[2] This refers to Section 8009 of Title VIII, Public Law 103-382, 108 Stat. 3764-3767 later codified as 20 U.S.C. § 7709.

> Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart. [Emphasis added].

This regulatory language is consistent with the equalization provisions of the 1994 statute as set out through §§ 7709(b)(1) and (2)(A). However, the Secretary then referred to the Appendix to Subpart K (Pet. App. at 92a-96a) as purporting to "describe the methods for making certain calculations in conjunction with determinations made under the regulations in this Subpart." Instead of using the method reflected in the 1994 statute, the Secretary virtually repeated the Appendix to the 1976 regulation (compare Brief, *supra*, p.11), making only some stylistic changes, thereby trumping Congress' formula with the Secretary's own. The current Appendix to the Regulation provides (Pet. App. at 92a-93a):

> Appendix
>
> The following paragraphs describe the methods for making certain calculations in conjunction with determinations made under the regulations in this part. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these determinations.
>
> The determination of disparity in current expenditures or revenues per pupil are made by –
>
> (i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second proceeding fiscal year before the year of determination;

(ii) identifying those LEAs in each ranking that fall at the 95th and fifth percentile of the total **number of pupils in attendance** in the schools of those LEAs; and

(iii)subtracting the lower current expenditure or revenue per pupil figure from the higher of those agencies identified in paragraph (ii) and dividing the difference by the lower figure

Example: In State X, after ranking all LEAs organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1,000. The percentage disparity between the 95th and 5th percentile LEAs is 22 percent ($1,000-$820=$180/$820). The program would meet the disparity standard for fiscal years before fiscal year 1998 but would not for subsequent years. (Pet. App. 93a). (Pet. App. at 92a. 93a) [Emphasis added].

The quoted example from the current Appendix (Pet. App. at 93a) is virtually identical to the example set out in the Appendix to the 1976 regulations (Pet. App. at 160a). The numbers in the 1995 Appendix example were not even adjusted for 18 years of inflation from the numbers used in the 1976 Appendix.[3]

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[3] One difference in the examples to the 1976 and the 1995 regulations is the wording in the later Appendix stating that the resulting 22% disparity in the Example "would meet the disparity standard for fiscals years before fiscal year 1998 but would not for subsequent years." That conclusion

The Secretary then continued and continues to use his old formula and not the statutory formula, ostensibly relying upon the Appendix for justification.

B. THE TWO IMPACT AID FORMULAS ARE RADICALLY DIFFERENT

Congress' 1994 formula at 20 U.S.C. §7709(b)(2)(B)(i) requires that in making determinations under the subsection the Secretary shall:

> I. Disregard local educational agencies with **per pupil expenditures or revenues** above the 95th percentile or below the 5th percentile of such expenditures or revenues in this State. (Emphasis added).

This is in contrast to the Secretary's Appendix which provides:

> The determinations of disparity are made by ranking all LEAs and then identifying those LEAs in each ranking that fall at the 95th and 5th **percentiles of the total number of pupils in attendance** in the schools of those LEAs. (Emphasis added).

The statute requires exclusion of LEAs whose per-pupil expenditures or revenues are above the 95th percentile and below the 5th percentile of per-pupil expenditures or revenues in the State.

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reflected another provision of the 1994 statute which required a reduction in the disparity spread from 25% to 20% to be effective 1998 or 1999. Pub. L. 103-382 Sec. 101, 108 Stat. 3765, Act of Oct. 20, 1994. That change was removed from the statute by amendment in 1996. Pub. L. 104-195, Sec. 10, 101 Stat. 2384, Act of Sept. 16, 1996. The permitted disparity spread remains at 25% per § 7709(b)(B)(i).

The word "percentile" as used in the statute has a well-defined meaning both in ordinary usage and in the realm of statistics: (1) Webster's Ninth New Collegiate Dictionary, p. 872 (1986 Merriam-Webster, Inc.) - "percentile. . . : a value on a scale of one hundred that indicates the percent of a distribution that is equal to or below it <a percentile score of 95 is a score equal to or better than 95 percent of the scores>."; (2) Merriam-Webster's Collegiate Dictionary Tenth Edition, p. 859 (2001 - Merriam-Webster, Inc.) - "percentile. . .: a value on a scale of one hundred that indicates the percent of a distribution that is equal to or below it <a score in the 95th percentile>"; (3) Hinkle, D. Wiersma, W., & Jurs, S., Applied Statistics for the Behavioral Sciences, pp. 49-50 (1994, Boston: Houghton Mifflin Company) - "A percentile is the point in a distribution at or below which a given percentage of scores is found. For example, the 28th percentile of a distribution of scores is the point at or below which 28% of the scores fall."; (4) Anderson, Sweeney & Williams, Statistics - Concepts and Applications, pp. 64-66 (West Publ. 1986):

> Percentiles
>
> A percentile is a statistical measure that locates values in the data set that are not necessarily central locations. In addition to identifying locations, this measure provides information regarding how the data items are spread over the interval from the lowest to the highest values. Hence, percentiles can also be viewed as measures of dispersion, or variability, in the data set. In large data sets that do not have numerous repeated values, the *p*th percentile is a value that divides the data set into two parts. Approximately p percent of the items take on values less than the *p*th percentile; approximately (100 - *p*) percent of the items take on greater values.

Percentile

> The *p*th percentile of a data set is a value such that at least *p* percent of the items take on this value or less and at least (100 – *p*) percent of the items take on this value or more.
>
> Admission test scores for colleges and universities are frequently reported in terms of percentiles. [4]

There are established standard methods for making a percentile calculation.[5] All produce percentile calculations as required by the statutory formula if applied to the data contained in an array of any State's LEAs ranked in order of their per-pupil revenues. None of these methods permit the injection of or consideration of any other factors e.g. pupil attendance numbers, in the calculation. Thus, where the objective is to calculate where the 95th and 5th percentiles fall along the array of LEAs ranked by their per-pupil revenues, no consideration can be given to other factors such as pupil

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[4] The word "percentage" means something quite different than the word "percentile." "Percentage" is defined as follows in (a) Webster's Ninth New Collegiate Dictionary, p. 872 (1986 Merriam-Webster, Inc.) and (b) Merriam-Webster's Collegiate Dictionary Tenth Edition p. 859 (2001 – Merriam-Webster, Inc.) – "percentage . . .: 1 a: a part of a whole expressed in hundredths b: the result obtained by multiplying a number by a percent."

[5] *See*, the U.S. Department of Commerce's (National Institute of Science & Technology) website setting out the "NIST SEMATECH e-Handbook of Statistical Methods. http: www.itl.nist.gov.div898 handbook.date." The part of that handbook which explains how to calculate percentiles can be found at http://www.itl.nist.gov/div/898/handbook/prc/section 2/prc262.htm. The handbook notes various standard methods for calculating percentiles, including the EXCEL program used by Judge O'Brien in his dissent to the Tenth Circuit's original panel decision. (Pet. App. at 24a, n.11).

attendance numbers. Thus, the Secretary's injection of a pupil attendance factor into the calculation is plainly at odds with the statute.

The Secretary arguably could have acted by regulation to require use of a particular one of the established standard percentile calculation methods for calculating the 95th and 5th percentiles as required by the statute, so long as the regulation did not require or permit the use of any data or factor beyond each LEA's per-pupil revenues in the calculation; but, that would have been the extent of the Secretary's authority. *See*, Part F.4, *infra* of this Brief. However, the Secretary did not do this. The Secretary's formula does not require calculation of the 95th and 5th percentiles based on the array of LEAs ranked by per-pupil revenues nor does it exclude from that list the LEAs whose per-pupil revenues fall above or below those percentiles. Instead, the Secretary's formula determines how to trim the list of LEAs based on consideration of their pupil attendance numbers, a criterion foreign to the statute. This is evident from examination of the Secretary's formula.

The first step in the Secretary's formula correctly ranks the LEAs by per-pupil revenues. (Pet. App. at 92a and 210a; *see*, Figure 1 *infra* at p. 20). The Secretary then proceeds to eliminate LEAs from the final field. *Id.* However, the Secretary does not do this by elimination of LEAs whose per-pupil revenues fall above the 95th and below the 5th percentiles (based on their ranking by per-pupil revenues) as required by the 1994 statute. Instead, as shown by Appendix K to the 1995 regulation, (Pet. App. at 92a-93a and quoted, *supra* at pp. 13-14) the Secretary has adopted an unrelated process which calls for excluding LEAs (from the top and bottom of the ranked list of LEAs) whose cumulative pupil attendance numbers are below the 5th percentile or above the 95th

percentile of total pupil attendance numbers.[6] This procedure is plainly illustrated in the example to Appendix K as set out on page 14, *supra*. The results of applying this procedure to New Mexico's LEAs for fiscal year 2000 is illustrated on the chart reproduced in Pet. App. at 210a, an excerpt from which is shown as Figure 1, *infra*, at p. 20.

As shown on Figure 1, the Secretary's formula as applied for fiscal year 2000 excludes (from the list of New Mexico LEAs ranked by per-pupil revenues) the top and bottom ranked LEAs whose cumulative pupil attendance numbers fall just short of accounting for 5% of total pupil attendance statewide (15,888) on each end of the list, based on a total State pupil attendance of 317,777.[7] (Pet. App. at 210a -213a). The

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[6] Notwithstanding the references to percentiles in the text of the Appendix at Pet. App. at 92a (quoted *supra*, at p. 14), the Secretary's procedure as applied does not actually involve calculation of the 95th and 5th percentiles even based on pupil attendance numbers, because the LEAs are never ranked and ordered by pupil attendance numbers and then subjected to a percentile calculation. The Secretary's formula would have to require such a ranking to run a ***percentile*** calculation based on a pupils attendance numbers. The example in the regulations (quoted *supra* at p. 15) and the Secretary's practice (as shown by Figure 1) is instead to determine a ***percentage*** of total pupil attendance numbers (5%) - and to exclude as many LEAs from the top and bottom of the list of LEAs as necessary to exclude those LEAs accounting for just under 5% of total student population from each end of that list. *See*, fn. 7. This process is even further removed from the statutory mandate.

[7] The Secretary's formula does not exclude the highest and lowest LEA whose pupil attendance numbers must be included to reach (and exceed) the number representing 5% of total pupil attendance for that year. *See*, Figure 1, where Peñasco's inclusion is required to reach (and exceed the number representing 5% of total pupil attendance on the top end of the list; and, inclusion of Hobbs is required to reach (and exceed) the number representing 5% of the total pupil attendance on the bottom end of the list, but neither district is excluded.

Figure 1 (Excerpt from Pet. App. 210a-213a with LEAs ranked by per-pupil rev. – N.M. Dept. of Ed. calcu.):

LEA NO.	DIST	REV/ MEM	TOTAL MEM	CUM. MEM	REV/MEM AT 95/5%
89	Mosquero	$6,520	57.00	57.0	
88	Corona	$5,791	81.00	138.0	
87	Los Alamos	$5,611	3509.50	3647.5	
86	Vaughn	$4,641	111.50	3759.0	
85	Hondo Valley	$3,690	157.50	3916.5	
84	Maxwell	$3,591	152.00	4068.5	
83	Mora	$3,530	707.50	4776.0	
82	Roy	$3,516	113.00	4889.0	
81	Logan	$3,484	278.00	5167.0	
80	Cuba	$3,404	773.00	5940.0	
79	Silver City	$3,391	3837.50	9777.5	
78	Texico	$3,335	498.00	10275.5	
77	Zuni	$3,320	1696.00	11971.5	
76	Springer	$3,295	285.50	12257.0	
75	Jemez Valley	$3,286	513.50	12770.5	
74	Ruidoso	$3,278	2408.00	15178.5	
73	Tatum	$3,266	369.00	15547.5	
72	Penasco	$3,259	709.50	16257.0	$3,259
* * [Data on LEAs from Center of List Excluded] * *					
7	Hobbs	$2,848	8114.50	22012.0	$2,848
6	Gadsen	$2,829	12000.50	13897.5	
5	Lake Arthur	$2,787	245.50	1897.0	
4	Dulce	$2,783	718.00	1,651.5	
3	Hagerman	$2,777	475.50	933.5	
2	Floyd	$2,725	261.50	458.0	
1	Des Moines	$2672	196.50	196.5	
Total			317,777.00		$411
5% OF MEM 15,888.85			DISPARITY 14.43%		

Figure 2 (Excerpt from Pet. App. at 30a-33a identifying LEAs ranked by number from lowest to highest based on per-pupil revenues):

EXHBIT A JUDGE O'BRIEN'S DISSENT

Impact Aid Disparity for 1999-2000

District	Revenue/Member	LEA No.
1 Mosquero	$6,520.00	89
2 Corona	$5,791.00	88
3 Los Alamos	$5,611.00	87
4 Vaughn	$4,641.00	86
5 Hondo Valley	$3,690.00	85
1st district ABOVE 95th Percentile		
$3,650.40 = 95th Percentile		
6Maxwell	$3,591.00	84
[Data on LEAs from Center of List Excluded]		
84 Gadsden	$2,829.99	6
$2,803.80 = 5th Percentile		
1st district below 5th Percentile		
85 Lake Arturn	$2,787.00	5
86 Dulce	$2,783.00	4
87 Hagerman	$2,777.00	3
88 Floyd	$2,725.00	2
89 Des Moines	$2,672.00	1
District	Revenue/Member	
Total	$284,095.00	
Mean	$3,192.08	
Median	$3,059.00	
95th Percentile	$3,650.40	
5th Percentile	$2,803.80	

Secretary's formula then simply pretends that the outcome of that calculation identifies the LEAs which fall above the 95th and below the 5th percentiles of LEAs ranked by per-pupil revenue. This pretense does not remotely resemble the kind of percentile calculation required by the statute.

By using a formula which eliminates LEAs based on *percentages of pupils* instead of eliminating LEAs whose per-pupil revenues fall above the 95th percentile or below the 5th percentile (based on per-pupil revenues), the Secretary excludes many New Mexico LEAs from the final field whose per-pupil revenues in fact fall between the 95th and the 5th percentiles of those LEAs when ranked by per-pupil revenues. *Compare,* Figure 1 and Figure 2 (excerpt from chart appended to Judge O'Brien's dissent); *see* p.21, *supra*.

Comparison of Figure 1 and Figure 2 clearly shows that the Secretary's formula excluded 13 more LEAs from the final list as to which the disparity test was applied, reducing that field to 66 from the 79 LEAs as required by the statutory formula and changing the outcome. New Mexico meets the 25% disparity test under the Secretary's formula: $3,259 - $2,848 = $441; 441/2848 14.43% = 14%; New Mexico does not meet the disparity test under the statutory formula using the highest and lowest non-excluded LEAs as identified by the 95th ($3,650.40) and 5th ($2,803.80) percentile values calculated with the EXCEL program used in Judge O'Brien's dissent: $3,591.00 - $2,829.99 = 761.01; 761.01/2829.99 - 26.90% = 27%. (Pet. App. at 24a)

That well reasoned dissent in the withdrawn Tenth Circuit Court of Appeals panel decision succinctly describes the two methods:

> These requirements [of the statutory formula] are unambiguous. A percentile is a mathematical concept not admitting of multiple interpretations; it is a simple,

straightforward method of ranking an array of values. Attached to this dissent is Exhibit A. It lists all of the 89 New Mexico LEAs along with the per-pupil revenues for each. (Pet. App. at 30a-32a) Analysis of that array yields a value of $3,650.40 for the 95th percentile and $2,803.80 for the 5th percentile. Five districts are above the 95th percentile and five districts fall below the 5th percentile; they are excluded from further analysis. After the exclusion, Gadsden district has the lowest per-pupil revenues ($2,829.00). When those revenues are multiplied by 125% the result is $3,536.00, an amount less than the highest non-excluded district, Maxwell - with per-pupil revenues of $3,591.00. The 25% test is not met.

The dissent then continues and describes the Secretary's formula. (Pet. App. at 25a)

> Rather than abide the statutory command to apply a mathematical function to an array of numbers, the Department adopted regulations directing a complex and mystifying formula for determining which LEAs fall into the 5th and 95th percentiles of per-pupil expenditures. 34 C.F.R. 222.162, *et. seq.* The regulations start correctly by requiring LEAs to be arrayed according to their per-pupil expenditures (or revenues). Next, and inexplicably, they require a calculation of 5 per cent of the total number of pupils in the state. The number of LEAs necessary to use up 5% of the state's student population <u>at both ends of the list</u> are eliminated from consideration in applying the 25% formula. Then the per-pupil expenditures of the highest and lowest remaining LEAs are used to determine whether there is less than a 25% disparity in funding and, therefore, "equalization." That seems quite at odds with the statute's directive to disregard

> LEAs "with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State.

The dissent's description of the process followed by the Secretary exactly tracks the State Department of Education's calculation using the Secretary's formula as set out at Pet. App. at 210a *et seq.* and the Secretary's formula as set out in the Appendix to 1995 regulation (Pet. App. at 92a-93a).

When Congress in 1994 decided by statute to establish the equalization formula, it rejected the Secretary's 1976 equalization formula. The Secretary's formula had by then been in force for 18 years without any apparent confusion. Had Congress wished to statutorily capture the Secretary's formula, the language was there for the taking. Instead, Congress chose a different course. Historically, the Secretary was aware of the important statistical difference between eliminating LEAs based on the pupil attendance numbers and eliminating LEAs based on per-pupil revenues. The Secretary knew that each method suffered from similar, but opposite defects. States with large numbers of small LEAs with relatively small student populations (as is the case in New Mexico) would have larger numbers of LEAs eliminated from the disparity calculation if percentiles of pupils were used in the calculation. States with fewer (and larger) LEAs would be subjected to other statistical infirmities if percentiles of LEA per pupil revenues were used to create the field of LEAs. (Pet. App. at 130a-131a).

As revealed in the public notice and comment proceedings in 1976, each method had its champions and detractors. Others felt that both methods were flawed. Of importance, however, is that these two methods are distinct and are mutually exclusive. Congress clearly chose to require the Secretary to stop eliminating LEAs based on pupil attendance

numbers in making the equalization calculation and instead to eliminate LEAs based on per-pupil revenues as specified in the statute. The Secretary's method is not an interpretation of the statutory method. One method is not a slightly different permissible variation from the other. One method cannot fill a gap left by the other. The Secretary's formula directly conflicts with and is irreconcilable with the statutory formula.

The administrative law judge (ALJ) in the administrative proceedings below also challenged Respondents' position that the Secretary's formula was the same as required by statute through questions put to Respondents' counsel about the difference between the formulas set out in the Appendix and in the statute. Not being able to resolve the difference, the response was that there was a "substantial difference between what . . . Congress intended . . ." and what "Congress in fact put in there" and that Congress was not "100% accurate with their language." The ALJ then stated: "In other words, the statute does not support the regulation? It's different." Department counsel then admitted "it is different." (JA 27). When asked by the ALJ if the Secretary and counsel could show the judge how "the statute's ambiguous," counsel for the Secretary responded: "The only way I can do that is by reference to the statutory purpose." (JA 29).

When the New Mexico Department of Education's counsel was confronted with the same questions and was asked by the ALJ to explain the argument in the State's "brief on the main issue [which maintained] . . . that the statute is consistent with the use of the student population. . .," the State's counsel responded: "We've done a lot of thinking about this issue and this conflict that seems to appear, and I am not certain that we would state that so plainly at this time. It is arguable that there is a difference, and we would defer to Mr. Smith on the Department's interpretation." (JA 47). When again pushed to explain how the regulation could be

held to be consistent with the statute, the response was that the State: "Would agree with the Department that the only reasonable way of determining disparity is on a per-pupil expenditure considering the students and not the LEAs." Again when asked whether the regulation was consistent with the statute, the State replied: "Literally, on the face of the words, perhaps not, probably not."

The Secretary's expert opined (JA 6) that the Secretary's formula was consistent with the statute but then opined that Petitioners' insistence on "applying percentiles to the revenues per membership of the highest and lowest LEAs in the State and then excluding LEAs with per-pupil revenues above or below the product of those calculations is not a proper method of restricting the range of the disparity test." (JA 6, ¶9). Since this method is precisely what the statute requires, the Secretary's expert has by these words admitted that the Secretary's formula deviates from the statutory formula in ways he and the Secretary believe desirable, but which in fact are prohibited.

Thus, as shown in Exhibit A to Judge O'Brien's dissent (Pet. App. at 30a-33a) and in the Table at Pet. App. at 210a-213a, New Mexico is not equalized under the statutory formula. *Compare,* Figure 1 and Figure 2, *supra.*

C. THE SECRETARY HAS NO AUTHORITY TO SUBSTITUTE HIS POLICY CHOICES REGARDING THE PROPER IMPACT AID FORMULA FOR THOSE OF THE CONGRESS

Each method of trimming the final field of LEAs used to make the disparity assessment risks (different) inequitable outcomes or anomalies in some circumstances. Which method is deemed the most appropriate ultimately reduces to a policy choice about which anomalies and inequities are the most tolerable. Congress could have delegated this call to the

Secretary, but it did not. It made this call itself in clear statutory language. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 314, 315-317 (1993). In *Beach*, this Court affirmed the legislative judgment of Congress in drawing the lines reflected in the F.C.C. statute to distinguish between different classes of communications media in applying media ownership rules. The Court noted that "[d]efining the class of persons subject to a regulatory requirement – much like classifying governmental beneficiaries – 'inevitably requires that some persons that have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'" *Id.* at 315-317.

The same fundamental separation of powers principles which bar the Courts from substituting their judgment for the judgment of Congress on where to draw such lines in such circumstances likewise bars the Executive Branch from substituting its judgment on such questions. Instead, the Executive Branch's duty to "take care that the Laws be faithfully executed" leaves Executive Agencies with no discretion and no power to substitute their own policy choices for those made by the Congress. Article II, § 3, U.S. Constitution; *Pennsylvania v. Wheeling and Belmont Bridge Company*, 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1855) (Congress had the right to change its mind through new legislation and by such new legislation to authorize construction of a bridge on the Ohio River which the Court had previously held to be prohibited based on prior acts of Congress. "So long as the will of Congress was to leave the river unimpeded, any impediment was a violation of the public right [as previously defined by Congress]. But once Congress changed its mind, the contours of the right changed, and there was no more ground for injunctive relief);

Biodiversity Associates v. Cables, 357 F.3d 1152 (10th Cir. 2004) (Where Congress expressly changed the law defining the circumstances when certain timber cutting could occur, the Forest Service had the right and duty to permit timber cutting based on the new statutory standards and equitable relief granted against the Forest Service under the prior standard could not be maintained because that relief was no longer warranted under the new statutory standard). In *Cables*, the Tenth Circuit emphasized:

> But when Congress is exercising its own powers with respect to matters of public right, the executive role of 'tak[ing] Care that the Laws be faithfully executed,' U.S. Const. art. II, §3, is entirely derivative of the laws passed by Congress, and Congress may be as specific in its instructions to the Executive as it wishes.
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> * * *
>
> To give specific orders *by duly enacted legislation* in an area where Congress has previously delegated managerial authority is not an unconstitutional encroachment on the prerogatives of the Executive; it is merely to reclaim the formerly delegated authority. (emphasis in original); *Stop H-3 Ass'n. v. Dole*, 870 F.2d 1419, 1437 (9th Cir. 1989)

Here, the statutory equalization formula mandates how to draw the lines to be used to measure whether the "no-greater-than-25%-disparity" standard has been violated. The Secretary's formula draws these lines differently–excluding many LEAs which in fact fall between the 95th and 5th percentiles on the list of LEAs ranked by per-pupil revenues as the statute requires. The Secretary's formula places different LEAs on one side of these lines than does the statutory formula, thus changing the outcome of the

equalization determination in New Mexico in ways clearly violative of the statute.

D. THE SECRETARY'S 1995 IMPACT AID FORMULA WAS NOT PROMULGATED AS A REGULATION INTENDED TO HAVE THE FORCE OF LAW

5 U.S.C. § 553 (JA 93-94) generally requires federal agencies to complete a public notice-and-comment process prior to promulgating regulations through rulemaking intended to have the force of law. There are exceptions. 5 U.S.C. § 553(b)(B) provides that the notice-and-comment requirements do not apply "when the agency for good cause finds (and incorporates the finding in a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impractical, unnecessary or contrary to the public interest." (JA 93-94).

The Secretary in 1995 promulgated regulations in response to Congress' 1994 legislation. In the Federal Register (Vol. 60, No. 189, p. 50774), the Secretary announced a "Waiver of Proposed Rulemaking" (Pet. App. at 163a) and exempted the regulation process from public notice-and-comment requirements. The new regulations, according to the Secretary, "merely reflect statutory changes, remove unnecessary and obsolete regulatory provisions, reorganize and clarify the language of the regulations, and make minor revisions. Thus, the regulations do not establish or affect substantive policy." 60 F.R. 50778 (Pet. App. at 163a)[8]

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[8] The Secretary also certified that "these regulations would not have a significant economic impact on a substantial number of small entities." (Pet. App. at 164a). But they do have a significant economic impact: they shift millions in annual Impact Aid funds from New Mexico LEAs to the State. (Pet. App. at 201a, 234a-236a)

Accordingly, the public notice-and-comment process, which was part of the Secretary's 1976 regulatory process, was eliminated from the 1995 regulatory promulgation process. Thus, as will be shown in Part F.3. *infra*, the Secretary's 1995 regulation was not published using the rulemaking process required to issue regulations intended to have the force of law.

E. THE CONTROLLING RULES ON STATUTORY CONSTRUCTION FORBID USE OF THE SECRETARY'S FORMULA

The controlling issue in this case is whether the Secretary had the authority to reinstate his 1976 formula after Congress in 1994 supplanted the Secretary's formula with Congress' own. This issue is controlled to a large extent by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) and its progeny:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

1. CONGRESS HAS DIRECTLY SPOKEN BY REQUIRING USE OF A DIFFERENT FORMULA

The starting point in every case involving construction of a statute is the language itself. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *TVA v. Hill*, 437 U.S. 153, 173 (1978); *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). The language at issue is § 7709(b)(2)(B)(i) (Pet. App. at 61a). Here, the Secretary is instructed that in developing the field of LEAs used in determining equalization, the Secretary is required to "disregard local educational agencies [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." This is a simple and straightforward instruction. This language does not permit the conclusion that the Secretary was empowered to rank LEAs by per-pupil revenues and then eliminate LEAs based on their attendance numbers as a device for reducing the field of LEAs against which the 25% disparity determination is applied. *See*, "plain meaning" analysis *infra* at part E.2. The statute does not permit the Secretary to replace a *percentile* elimination of ranked LEAs with a *percentage* elimination using pupil attendance numbers.

Congress has spoken. The statute requires use of the statutory formula. Congress' formula is clear. That should be "the end of the matter." *Chevron*, 467 U.S. at 842.

2. THE PLAIN MEANING OF THE 1994 STATUTE REQUIRES USE OF THE STATUTORY FORMULA RATHER THAN THE SECRETARY'S FORMULA

Even if, *arguendo*, Congress' actions and intent were found to be not entirely clear, "traditional tools of statutory construction" would then come into play. If after this process

Congress' intent is clarified, that also ends the matter. *Chevron* at 843, n. 9 provides:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. See, e. g., FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981); SEC v. Sloan, 436 U.S. 103, 117-118 (1978); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745-746 (1973); Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968); NLRB v. Brown, 380 U.S. 278, 291 (1965); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965); Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946); Burnet v. Chicago Portrait Co., 285 U.S. 1, 16 (1932); Webster v. Luther, 163 U.S. 331, 342 (1896). If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

"Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-448 (1987)." cited in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004)

Some of the devices used in interpreting congressional action include a "natural reading," and considering "Congress' interpretive clues." *General Dynamics Land Systems, Inc.*, at 586. "[S]tatutory language must be read in context [since] a phrase 'gathers meaning from the words around it.'" *Id.* at 596. Viewing the "textual setting" is also employed. *Id.* at 597. "On the assumption that ambiguity

exists, we turn to examine the textual evolution of the limitation in question and the legislative history that may explain or elucidate it." *United States v. R.L.C.*, 503 U.S. 291, 298 (1992).

As this Court held in *Food & Drug Administration v. Brown and Williamson Tobacco Corporation*, 529 U.S. 120, 132 (2000):

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. See Brown v. Gardner, 513 U.S. 115, 118 (1994) ('ambiguity is not a creature of definitional possibilities but of statutory context'). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." . . . Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.

Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987) is instructive. There, the Immigration and Naturalization Service ("INS") contended that an immigration statute which permitted a refugee to seek asylum if he had a "well-founded fear" of persecution and another statute which allowed an illegal immigrant to avoid deportation if he could show a "clear probability" that he would be subject to persecution established the same legal standard for use in assessing asylum applications and for making deportation avoidance decisions. Accordingly, it was argued, the standard of "clear probability" could be applied

by INS to all proceedings brought by an illegal alien or a refugee under either of the statutory provisions. The INS made arguments similar to those being made by the Secretary. First, the INS suggested that the differences in the two statutes were not sufficient to prevent the INS from imposing the more difficult standard of a "clear probability" on both proceedings. The Court disagreed:

> The Government argues, however, that even though the "well-founded fear" standard is applicable, there is no difference between it and the "would be threatened" test of § 243(h). It asks us to hold that the only way an applicant can demonstrate a "well-founded fear of persecution" is to prove a "clear probability of persecution." The statutory language does not lend itself to this reading.
>
> To begin with, the language Congress used to describe the two standards conveys very different meanings. *Id.* at 430

The Court continued:

> This ordinary and obvious meaning of the phrase is not to be lightly discounted. See Russello v. United States, 464 U.S. 16, 21 (1983); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 198-199 (1976). With regard to this very statutory scheme, we have considered ourselves bound to "'assume "that the legislative purpose is expressed by the ordinary meaning of the words used."'" INS v. Phinpathya, 464 U.S. 183, 189 (1984) (quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982), in turn quoting Richards v. United States, 369 U.S. 1, 9 (1962)). *Id.* at 431.

In this case, the Secretary has consistently argued that the language of the 1994 statute is sufficiently flexible to embrace the language of the Secretary's 1995 formula. For the reasons shown in Part B., *supra,* that claim rings as hollow here as it did in *Cardoza-Fonseca*.

The *Cardoza-Fonseca* case also concludes that clear intent is expressed when Congress chooses different language or establishes different standards while adopting certain provisions from existing statutes.

> The different emphasis of the two standards which is so clear on the face of the statute is significantly highlighted by the fact that the same Congress simultaneously drafted § 208(a) and amended § 243(h). In doing so, Congress chose to maintain the old standard in § 243(h), but to incorporate a different standard in § 208(a). "'[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Russello v. United States, supra, at 23 (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (CA5 1972)). The contrast between the language used in the two standards, and the fact that Congress used a new standard to define the term "refugee," certainly indicate that Congress intended the two standards to differ. *Id.* at 432

In the present case, Congress in 1994 adopted certain provisions from the Secretary's 1976 regulations but at the same time rejected the part of those regulations which required trimming the final field of LEAs (as to which the disparity test would be applied) based on a percentage of their pupil attendance numbers. As shown in Part B., *supra,* the

statutory formula does not permit the injection of that extraneous factor into the percentile calculation which must be based solely on per-pupil revenues.

When, as here, the words in a statute are undefined, the Congress is presumed to have intended they be given their "ordinary meaning." Their "ordinary meaning" can be supplied by dictionary definitions except where it is clear from "reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis" that some other meaning was intended. *Dolan v. U.S. Postal Service,* __ U.S. __, 126 S.Ct. 1252, 1257 (2006) (words "negligent transmission" in Federal Tort Claims Act exception to U.S. sovereign immunity waiver were properly given their "ordinary meaning" based on Webster's dictionary definition where nothing in statute suggested the Congress intended a different meaning); *accord, Rousey v. Jacowey,* 544 U.S. 320 (2005) (applying same rule to give words "on account of" in bankruptcy statute their "ordinary meaning" based on dictionary definition). Nothing in the 1994 statute or the circumstances warrants giving the word "percentile" anything other than its ordinary meaning. Doing so leaves no ambiguity in the statute on this point. The statute's plain language (and its sparse legislative history, *see, infra* at p.37,) leave no doubt that the statutory formula is different than the Secretary's formula. No argument from ambiguity can bridge that gap.

The historical context reveals that during the 1976 public notice-and-comment proceeding, two alternative methods for developing final fields of LEAs were debated – the percentile elimination of pupils and the opposing method of the direct percentile elimination of LEAs. These were mutually exclusive formulas. Congress' formula expressly mandates a formula which requires the percentile elimination of LEAs

based on per-pupil revenues. This left no room for further administrative action to adopt a different formula.

Moreover, the Secretary's formula produces an outcome plainly at odds with the intent of Congress that LEAs eligible to receive Impact Aid funds will actually receive and retain the benefit of those funds unless the statutory equalization test is met. Congress' intent on this point is crystal clear: "Section 8009 prohibits a State from taking Impact Aid payments into account in determining the amount of State aid to be paid to LEAs that receive Impact Aid, unless that State has an equalization plan approved by the Secretary and describes the standard which State plans must meet." House Report 103-425, 103rd Cong., 2nd Sess. (Feb. 16, 1994), p. 71. Section 8009 was later codified at 20 U.S.C. § 7709. *See*, *supra* at fn. 2. Using the Secretary's formula in place of the statutory formula deprives Petitioners (and other similarly situated LEAs) of the Impact Aid funds the Congress intended them to receive and permits this result though the statutory equalization test is not met.

F. THE SECRETARY'S FORMULA IS NOT ENTITLED TO *CHEVRON* DEFERENCE

Examining Congress' formula should end any further inquiry into Congress' intent. Congress' formula and not the Secretary's formula must be used in this equalization process. Petitioners further contend that traditional rules of statutory construction cement this conclusion. However, assuming for the sake of argument, that Congress' formula contains an ambiguity, the Secretary's purported interpretation is not deserving of any *Chevron* deference. Further, even with *Chevron* deference the Secretary's formula is not a "permissible" interpretation of Congress' formula.

This Court has "devoted a fair amount of attention lately to varying degrees of deference deserved by agency

pronouncements of different sorts, *see*, *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000) . . . ." *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. at 600.

Barnhart v. Walton, 535 U.S. 212, 217 (2002), in relying on *Chevron* stated "If, however, the statute 'is silent or ambiguous with respect to the specific issue,' we must sustain the Agency's interpretation if it is 'based on a permissible construction' of the Act." (*Citing*, *Chevron*, 467 U.S. at 843). To like effect is *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 125 S.Ct. 2688, 2702 (2005) where it was held that "[I]f the statute is ambiguous on the point, we defer . . . to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make'".

United States v. Mead, 553 U.S. 218, 226-227 (2001) however, identified two prerequisites to any *Chevron* deference.

> We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. (Emphasis added)

Gonzales v. Oregon, ___ U.S. ___, 126 S.Ct. 904 (2006) (holding that Controlled Substances Act did not give the Attorney General authority to issue regulations prohibiting the use of controlled substances in assisted suicides authorized by State law) confirmed the holding in *Mead*: "*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to

authority Congress has delegated to the official. *Mead,* 533 U.S., at 226-227". *Gonzales*, at 916. Accordingly, to establish a right to *Chevron* deference the Secretary would have to show: (a) that the Congress in this case delegated to the Secretary the authority, either expressly or impliedly, to create or modify the statutory equalization formula pursuant to a rule "carrying the force of law" and (b) that the interpretation claiming deference was "promulgated in the exercise of that authority." (*Mead*, 553 U.S. at 226-227). The Secretary cannot satisfy either of these requirements.

1. THE CONGRESS DID NOT GIVE THE SECRETARY EXPRESS AUTHORITY TO ADOPT A DIFFERENT FORMULA

In *Gonzales*, the Attorney General issued an interpretive rule prohibiting the use of controlled substances to assist in suicides otherwise permitted under the Oregon Death With Dignity Act. The State of Oregon contended that the Attorney General lacked the authority to promulgate such an interpretive rule. The Attorney General first claimed that he had special authority to interpret certain provisions of the Controlled Substances Act because they were embodied in a regulation, relying on *Auer v. Robbins*, 519 U.S. 452, 461-463 (1997), which deferred to an agency interpreting its own regulations. The Supreme Court dismissed this contention as the regulation simply repeated or paraphrased the statutory provisions. Accordingly, the focus returned to what authority had been granted by Congress to the Attorney General to interpret this particular statute. This Court concluded that the Attorney General did not have such broad delegated authority.

> The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable. 'Congress, we have held, does not alter

> the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes. . . ." *Id.* at 921.

The Attorney General's interpretive rule received no Chevron deference, but instead was given weight only to the extent it had the "power to persuade." *Id.* at 922. The Court found the Attorney General's interpretation to be unpersuasive.

In *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. 638 (1990), the Department of Labor claimed authority to declare a federal worker's compensation law and its additional benefits to be preempted by state law. Since this preemption issue was not addressed by the federal legislation, the argument went, this caused a "gap" which the Secretary could fill. The Supreme Court disagreed:

> A precondition to deference under *Chevron* is a congressional delegation of administrative authority. Bowen v. Georgetown University Hospital, 488 U.S. 204, 208, 109 S. Ct. 468, 471, 102 L.Ed.2d 493 (1988). *See also*, *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123, 108 S. Ct. 113, 420-421, 98 L.Ed.2d 429 (1987) (*Chevron* review of agency interpretation of statutes applies only to regulations "promulgated pursuant to congressional authority") *Id.* at 494 U.S. at 649.
>
> Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.' *Id.* at 650.

In the present case, Congress spoke definitively. The Secretary had express authority prior to 1994 to create the equalization formula. He did so. In 1994, Congress enacted § 7709 establishing the statutory formula. That statute took away the Secretary's authority to issue or use any formula different from the statutory formula. While the Secretary has general rulemaking authority, the Secretary's legislative rulemaking authority to establish the equalization formula was eliminated. Congress does not expressly or impliedly delegate to an agency authority which it has expressly revoked. Congress' intent was clear: Federal Impact Aid money is intended to go to LEAs, not to go into State operational funding accounts unless the State can show that it has equalized its public school operational funding as measured by the statutory formula. *See,* § 7709 and legislative history quoted *supra* at p. 37. No interpretation at odds with that intent can be a permissible or reasonable interpretation of the statute. The Secretary had no authority to issue and has no authority to use the old formula.

2. THE SECRETARY HAS NO IMPLIED AUTHORITY TO ADOPT A DIFFERENT FORMULA.

The same arguments showing why the Secretary's claims of an express delegation of rulemaking authority must be rejected also show why the Secretary's claims of implied rulemaking authority over the equalization formula must be rejected.

National Cable and Telecommunications Association, 545 U.S. 967, 125 S.Ct. at 2699, concluded:

> In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps,

> the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. (*Citing*, *Chevron*, 467 U.S. 856-866.

Mead, 533 U.S. at 229 further developed the notion of implied delegation of authority (again citing *Chevron* at 467 U.S. at 842-845):

> This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that '[s]ometimes the legislative delegation to an agency on a particular question is implicit.' 467 U.S., at 844. Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one which 'Congress did not actually have an intent' as to a particular result. Id., at 845. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, see id. at 845-846 . . ., but is obliged to accept the agency's position if Congress has not previously spoken to the point issue and the agency's interpretation is reasonable. . . .

The 1994 statute did not leave a "gap" in the formula which the Secretary was authorized to fill. It removed from the Secretary the authority to develop the equalization formula and clearly provided for the two essential components of the

formula: the permissible percentile of disparity (25%) and the method for developing the final field of LEAs as to which that disparity determination must be made. Congress had no "expectations" that the Secretary would be filling any "gaps" in the equalization formula. It was legislatively enacted and complete. The Secretary's rule-making authority over the equalization formula was specifically removed.

3. SINCE THE SECRETARY'S FORMULA WAS NOT ISSUED IN EXERCISE OF RULEMAKING AUTHORITY IT IS NOT ENTITLED TO *CHEVRON* DEFERENCE

Even if an agency has been given rule-making authority to interpret a statute, the interpretation claiming deference must be promulgated "in the exercise of that [rule-making] authority." *U.S. v. Mead Corp.*, 533 U.S. at 226-227, 229. (Emphasis added). The Secretary did not promulgate the 1995 Appendix formula in the exercise of any rulemaking authority.

As noted earlier (Part D, *infra*), the Secretary in enacting the 1995 regulation exempted the promulgation process from the public notice-and-comment requirements of 5 U.S.C. § 553 and announced that no rule-making was occurring. Instead, the regulations "merely reflect statutory changes, remove unnecessary and obsolete regulatory provisions, reorganize and clarify the language of the regulations, and make minor revisions. Thus, the regulations do not establish or affect substantive policy." 60 F.R. 50778 (Pet. App. at 163a) (Emphasis added). The Secretary specifically rejected the notion that these regulations were being enacted as administrative rules "carrying the force of law." For that reason alone the Secretary's formula should be summarily rejected. At the very least, it is not entitled to *Chevron* deference.

It is also important to note that this is not a situation where Congress enacted new legislation and the Secretary subsequently promulgated clarifying, interpretive or gap filling regulations. The Appendix currently in force and upon which the Secretary relies is in substance and virtual form the same as his 1976 Appendix which Congress legislatively supplanted. It predated Congress' legislation by approximately 18 years. The Secretary did not promulgate a new rule, he merely hung on to an old one.

4. SINCE THE SECRETARY'S FORMULA IS INCONSISTENT WITH THE STATUTORY FORMULA IT CANNOT BE A PERMISSIBLE ADMINISTRATIVE INTERPRETATION OF THE STATUTE.

If an agency interpretation is not deserving of *Chevron* deference, "the weight of such judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Gonzales*, at 922, *citing, Skidmore v. Swift & Co.*, 423 U.S. 134, 140 (1944) and referencing *Mead*, 433 U.S. at 235. *See, also, Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (". . . under *Skidmore* we follow an agency's rule only to the extent it is persuasive.").

The significance of according *Chevron* deference to an administrative interpretation is that if the agency's interpretation is permissible, it is to be followed by the Courts. Without *Chevron* deference, the Courts are free to decide which allowable interpretation prevails.

Even with full *Chevron* deference accorded an agency's interpretation, the interpretation must be based on a "permissible construction of the statute." *Chevron*, 467 U.S.

at 843; *Regions Hospital v. Shalala*, 522 U.S. 448, 457 (1998); *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987).

A permissible interpretation "reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent." *Rust v. Sullivan*, 500 U.S. 173, 188-189 (1991) or is "rational and consistent with the statute" (*Pension Benefit Guaranty Corporation v. LTV Corporation, et al.*, 496 U.S. 633, 650 (1990).

Determining whether an interpretation is permissible involves an analysis of the purported statutory ambiguity and the options for resolution encompassed by the ambiguity itself. Accordingly, one is generally faced with only a few choices. In *Shalala*, the Court noted:

> We face these choices. Congress meant either for the Secretary to calculate future reimbursements using a figure emerging through regular NAPR review and the 3-year reopening window, or for the Secretary to use the figure recognized as reasonable at a later time, informed by a more careful assessment. 522 U.S. at 459

The Court in *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986) also examined Congress' language to isolate the options for resolving statutory ambiguity. 476 U.S. at 980-981

Finally, in determining whether an interpretation is permissible, the courts also refer to the legislative history to further either identify or restrict the options: "The language of the statute and the legislative history can support either of the litigant's positions. . . . When we find, as we do here, that the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal, we

customarily defer to the expertise of the agency." *Rust v. Sullivan*, *supra* at 185.

In this case, Congress removed from the Secretary the authority to craft the equalization formula. Congress tended to this process itself and developed a specific formula intended to achieve a specific outcome: to ensure that LEAs rather than States received the benefit of Federal Impact Aid funds unless State public school educational funding has been "equalized" under the Congress' statutory formula. Substitution of the Secretary's quite different formula prevents the achievement of this express Congressional purpose. Accordingly, it cannot stand. *See*, § 7709 and legislative history quoted *supra* at p. 37.

G. RESPONDENTS' OTHER POLICY ARGUMENTS CANNOT SALVAGE THE SECRETARY'S FORMULA

A primary argument presented throughout the course of these proceedings by Respondents is that the Secretary's formula (which eliminates LEAs based on pupil attendance numbers) is more statistically sound and produces fewer inequitable results than Congress' method requiring elimination of percentiles of LEAs based on per-pupil revenues. The short and conclusive answer is that once Congress has spoken, that ends the discussion. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, *supra; Pennsylvania v. Wheeling and Belmont Bridge Company*, *supra*. Policy arguments of this sort must be directed to the Congress, not to the courts. *Mobil Oil Corp. v. Higgenbotham*, 436 U.S. 618, 625(1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. . . . we have no authority to substitute

our views for those expressed by Congress in a duly enacted statute.")

Further, the argument itself announces its own death. Stating that the Secretary's formula is better admits that it is different. If it is different, it cannot survive.

Respondents have also argued that allowing the intended beneficiaries of the Impact Aid to receive the Impact Aid without penalty will distort the New Mexico equalization funding formula at the expense of other school districts. This is not a legal argument. It is just another plea that this Court should condone the Secretary's substitution of his judgment for the Congress' judgment on policy issues. Moreover, the Impact Aid funding in New Mexico for fiscal year 2000 was approximately 2.7% of New Mexico's total operational budget for education. (Pet. App. at 234a-236a). More importantly, the statute at 20 U.S.C. §7709(b)(2)(B)(ii) and the current regulation at 34 C.F.R. §222.162(c)(2) allow a State to back out special funding associated with unique conditions found in certain LEAs to establish a base funding level. *See*, Pet. App. at 214a, 219a and 61a. Anomalies attributable to these special factors are removed. Even with this weighted funding backed out, in New Mexico the revenue per member for Mosquero was $6,520 (Pet. App. at 210a) 2.44 times greater than and the revenue per member for Des Moines of $2,672. (Pet. App. at 213a).

New Mexico is free to equalize its funding or not as it chooses. If New Mexico wants to have the benefits of achieving equalization, it must meet the 25% disparity test under the rules set by Congress. It has not done so. Thus, as shown above, the Secretary's formula is depriving Petitioners and other Impact Aid eligible LEAs in New Mexico of the federal funds the Congress intended them to receive. Those funds have in effect been diverted to the State's general

operational fund, contrary to the will of Congress. Petitioners have shown they were entitled to retain their Impact Aid funds for fiscal year 2000, and for all intervening years for which New Mexico was not equalized under the statutory formula.

CONCLUSION

The Secretary's Decision should be reversed, the Tenth Circuit's *En Banc* Opinion affirming the Secretary's equalization formula should be ruled inconsistent with the 1994 statute, and New Mexico's operational funding for fiscal year 2000 should be declared to not be equalized in accordance with the statutory equalization formula.

Respectfully submitted,

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